

**BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL**

**[2017] NZREADT 48**

**READT 018/17**

IN THE MATTER OF

An Appeal under Section 111 of the Real Estate Agents Act 2008

BETWEEN

KRISTINA-LORRAINE BROOK  
Appellant

AND

THE REAL ESTATE AGENTS  
AUTHORITY (CAC 403)  
First Respondent

AND

JASON HYNES  
Second Respondent

On the papers

Tribunal:

Hon P J Andrews (Chairperson)  
Ms N Dangen (Member)  
Ms C Sandelin (Member)

Submissions received from:

Ms Brook, Appellant  
Ms Bishop on behalf of the First  
Respondent  
Ms Gaborieau, on behalf of the Second  
Respondent

Date of Ruling:

17August 2017

---

**RULING OF THE TRIBUNAL**  
**(Application to admit fresh evidence, to question witnesses, and present material to the Tribunal that was not provided to the Committee)**

---

## Introduction

[1] Ms Brook has appealed against the decision of Complaints Assessment Committee 403 (“the Committee”) in respect of her complaint concerning two licensees: Mr Wayne Graham ( a licensed agent and owner of Wayne Graham Realty DN Ltd (“the agency”)), and Mr Jason Hynes (a licensed salesperson employed by the agency).<sup>1</sup>

[2] In those decisions the Committee:

[a] decided to take no further action against Mr Graham, and

[b] found Mr Hynes guilty of unsatisfactory conduct, and ordered him to pay a fine of \$1,500.<sup>2</sup>

[3] The appeal concerns the findings and orders against Mr Hynes, only.

[4] Ms Brook has applied to the Tribunal to admit evidence, to question witnesses, and to present material that was not before the Committee, at the hearing of her appeal. The application is opposed by both the first and second respondents.

[5] In considering Ms Brook’s application, the Tribunal has not referred to the bundle of the material that was before the Committee. Ms Brook’s application is premised on:

[a] the material she seeks to have admitted was not before the Committee;  
and

---

<sup>1</sup> Ms Brook and her husband complained to the Real Estate Agents Authority. The appeal has been brought by Ms Brook, alone. In respect of the Committee’s consideration of the complaint, reference will be made to “the complainants” (that is, Ms Brook and her husband). In respect of the appeal, reference will be made to Ms Brook).

<sup>2</sup> *Re Wayne Graham and Jason Hynes (Complaint No CO9676)*, “Decision to take no further action in the matter of Wayne Graham and Decision finding unsatisfactory conduct in the matter of Jason Hynes”, 21 January 2017 (“substantive decision”); and *Re J Hynes (Complaint No CO9676)*, “Decision on Orders”, 26 April 2017 (“penalty decision”).

[b] the questions she seeks to ask of witnesses relate only to the statements of those witnesses that were before the Committee.

[6] Accordingly, there is no need to refer to the material that was before the Committee, and to do so would put the Tribunal at risk of determining the appeal before it is heard.

## **Background**

[7] In September 2013, the complainants bought a property at Opoho, Dunedin (“the property”), in respect of which Mr Hynes was the listing and selling agent. After the purchase was settled, the complainants discovered a number of issues with the property. They discovered rot in the floorboards when they removed carpets, and they learned that outdoor structures were not within the title to the property and were not legal. Their complaint covered those matters, and Mr Hynes’ conduct, and that of his manager, Mr Graham, during the course of their purchase.

[8] As summarised by the Committee, the complaint was that Mr Hynes and Mr Graham:<sup>3</sup>

- (a) failed to identify and disclose outdoor structures not on the title and not legal;
- (b) did not recommend they seek legal advice;
- (c) did not recommend that they seek technical or other advice;
- (d) did not allow reasonable opportunity to obtain advice;
- (e) did not disclose risk or existence of hidden defects;
- (f) did not keep records;
- (g) failed to supply sale and purchase guides;
- (h) was not a genuine multi-offer process (the Complainants doubt it was a multi offer);
- (i) provided no in house complaints procedure; and
- (j) did not advise them they could contact the REAA.

[9] The remedy sought was for compensation to mitigate their loss, cancellation of Mr Hynes’ licence, and publication of his name.

---

<sup>3</sup> Substantive decision, at paragraph 1.6.

## The Committee's decisions

### *Mr Graham*

[10] The Committee accepted Mr Graham's statements that he was not the listing or selling agent of the property, and had not seen the title or other documentation related to the sale until it became a matter of complaint to the agency.<sup>4</sup>

### *Mr Hynes*

[11] The Committee found that Mr Hynes had breached r 5.1 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012 ("the Rules"), and in so doing had engaged in unsatisfactory conduct under s 89(2)(b) of the Real Estate Agents Act 2008 ("the Act"). That finding related only to the complaint that he had "failed to identify and disclose outdoor structures not on the title and not legal".<sup>5</sup> The Committee dismissed all other complaints against Mr Hynes.

[12] In its penalty decision, the Committee noted that the complainants sought publication of Mr Hynes' name, cancellation of his licence, and payment of \$180,251.64 for losses they attributed to Mr Hynes.<sup>6</sup> The Committee stated that it could not impose a penalty in respect of complaints that had not been upheld.<sup>7</sup> That is, it could only impose a penalty on the one aspect of the complaint that it had upheld: the failure to identify and disclose structures that were not within the title, and were not legal.

[13] The Committee also stated that it did not have jurisdiction to make the order for compensation requested by the complainants,<sup>8</sup> and noted mitigating factors.<sup>9</sup> In ordering Mr Hynes to pay a fine of \$1,500, the Committee stated that it considered that the finding of unsatisfactory conduct, and the fine imposed, were appropriate to the level of offending in the case.

---

<sup>4</sup> Substantive decision, at paragraphs 3.5–3.8.

<sup>5</sup> Substantive decision, at paragraphs 3.10–3.25

<sup>6</sup> Penalty decision, at paragraph 1.2.

<sup>7</sup> Penalty decision, at paragraph 3.3.

<sup>8</sup> Penalty decision, at paragraph 3.6, (citing *Quin v Real Estate Agents Authority* [2012] NZHC 3557).

<sup>9</sup> Penalty decision, at paragraph 3.7 and 3.8.

## The application

[14] Ms Brook has applied to:

[a] Adduce further evidence, being:

- [i] Email correspondence between Mr Hynes and the vendor's attorney. Ms Brook submits that this will show that Mr Hynes breached his fiduciary duty to the vendor by failing to advise the attorney of the potential for issues,<sup>10</sup> and that the vendor's attorney was made aware of the breach of duty and struck a deal to exonerate Mr Hynes.<sup>11</sup>
- [ii] Email correspondence between counsel for the complainants and for Mr Hynes. Ms Brook submits that this provides evidence of Mr Hynes' and the agency's continued reluctance to disclose facts and the truth, and the agency's "workplace culture of caveat emptor and lack of concern for clients and customers, which may promote licensee negligence".<sup>12</sup> Ms Brook further submits that it is relevant to the appeal against the Committee's decision to "condone the behaviour".
- [iii] Further email correspondence between counsel for the complainants and for Mr Hynes. Ms Brook submits that this potentially suggests that Mr Hynes withheld the names of witnesses (relating to people who visited open homes at the property). She submits that this suggests that Mr Hynes may have had something to hide in the investigation, and may have deceived the Authority's investigator as to people who visited open homes.

---

<sup>10</sup> This appears to be a reference to the underfloor rot.

<sup>11</sup> This appears to be a reference to civil proceedings brought by the complainants against the vendor and the agency. The agency cross-claimed against the vendor. The proceedings were subsequently settled, with a payment being made to the complainants.

<sup>12</sup> This also appears to be a reference to the civil proceedings.

[iv] Material showing training that was ignored by Mr Hynes. She submits that training information is required as evidence that the Committee ignored Mr Hynes' multiple breaches of training.

[v] Affidavits sworn by herself and her husband.

[b] Question witnesses:

[i] While it is not clear from Ms Brook's application, this aspect of the application appears to relate to three witnesses interviewed by the Authority's investigator, and Ms Brook and her husband. Ms Brook submits that the investigator had the opportunity to question the witnesses further, but chose not to do so. She submits that as a result of deficiencies in the investigation, the Tribunal should accept her request to question witnesses.

[c] Further material, being:

[i] Affidavits from an engineer who assessed the property and a builder who installed double glazing prior to insulation being installed. Ms Brook submits that these would refute the Committee's assumptions that the house would not have dampness issues, that the insulation installers may not have been aware of the rot, or that the rot did not start until after the insulation was installed.

[ii] Several photographs and DVD footage (approximately two minutes). Ms Brook submits that this is evidence that the potential for issues (of which Mr Hynes should have advised the vendors and purchasers) may need investigating.

[15] On behalf of the Authority, Ms Bishop submits that the appeal challenges, in particular, the Committee's decision to "dismiss the complaint about Mr Hynes' failure to disclose the rot in the flooring" of the property. She characterises the

issues on appeal as being whether the Committee erred in its assessment of the evidence concerning the rot in the flooring and other aspects of the complaint, and erred in determining the appropriate orders.

[16] Ms Bishop also submits that the evidence Ms Brook seeks to adduce is not fresh, and not material to determination of the appeal. She submits that all the material Ms Brook refers to would have been available to the Committee, or able to be obtained by the complainants, to be presented to the Committee.

[17] In particular, Ms Bishop submits that the email correspondence (referred to at paragraph [12][a][i]–[iii] above) dates from March to May 2015 (well before the complaint was heard), so cannot be considered “fresh” and is, in any event, tangential to the issues that were before the Committee. She further submits that the material about training (which she describes as extracts from information sheets and continuing education material obtained from the Authority’s website) does not bear the weight Ms Brook places on it, and the Committee and the Tribunal are able to assess Mr Hynes’ conduct by reference to the standards of conduct and competence set out in the Rules.

[18] Finally, Ms Bishop submits that statutory declarations made by the complainants were provided to the Committee when it was considering appropriate orders. She submits that to the extent the statutory declarations are relevant, they essentially repeat the complainants’ position as set out in their original complaint.

[19] Regarding the application to question witnesses, Ms Bishop lists five persons to whom the application might refer. She suggests that Ms Brook may wish to question witnesses as to an odour noticed at the open homes, and as to what Mr Hynes said to them about other potential issues with the property. She submits that it is difficult to see what useful purpose would be served by further exploring the issues considered by the Committee, and that Ms Brook’s application is essentially a “fishing expedition”. She submits that the more appropriate course would be for Ms Brook to obtain statements from the witnesses concerned, in order to clearly identify the new evidence she seeks to have admitted.

[20] Regarding the application to admit further material, Ms Bishop submits that none of it could be described as “fresh”, as it could all have been obtained and presented to the Committee. She further submits that in the absence of statements from the engineer and builder concerned, it is difficult to assess whether it would be in the interests of justice for the Tribunal to consider allowing the evidence to be admitted.

[21] On behalf of Mr Hynes, Ms Gaborieau adopts the submissions for the Authority, and further submits that Ms Brook has failed to demonstrate that it would be in the interests of justice to grant the application.

[22] Ms Brook filed a reply submission, submitting that the Authority has, in part, incorrectly identified the issues on appeal (by characterising it as challenging “the Committee’s decision to dismiss the complaint about [Mr Hynes’], failure to disclose the rot in the flooring”) and that the submissions for the Authority and the second respondent are “clutching at straws”, and not relevant to the issues on appeal.

[23] She further submits that the issue of what caused the odour noticed by visitors to the open homes needs further investigation by the Tribunal, particularly as Mr Hynes denied being aware of any odour. Finally, she submits that she would be denied justice if the Tribunal accepts without question the submissions for the Authority and Mr Hynes, and that those submissions have failed to identify any valid or objective reasons why she should be denied justice.

### **Principles to be applied in determining the application**

[24] Pursuant to s 111(3) of the Act, an appeal against a Complaints Assessment Committee’s decision is a rehearing; that is, the appeal is determined by reference only to the material that was before the Committee, and the submissions made by or on behalf of the parties to the appeal.

[25] As the Tribunal said in *Eichelbaum v The Real Estate Agents Authority*, the Tribunal may accept further evidence, or material that was not put before the Committee, if it considers the evidence or material will assist it in determining the



appeal. Such evidence or material must be cogent and material to the Tribunal's determination of the appeal, and not reasonably available to be put before the Committee. The Tribunal may also permit witnesses to be questioned as to their statements to the Committee. In deciding whether to admit further evidence or further material, or to permit witnesses to be questioned, the Tribunal will have regard to the interests of justice.<sup>13</sup>

[26] In its judgment in *Nottingham v the Real Estate Agents Authority*, the Court of Appeal stated:<sup>14</sup>

[81] [An appeal to the Tribunal] is supposed to be conducted by way of re-hearing of the proceeding before the [Complaints Assessment Committee]. ... Except in exceptional circumstances, full oral hearings before the Tribunal are not appropriate. Doing so risks drawing the Tribunal away from the material comprising the record before the [Committee] so that a decision might be made on a quite different basis. ...

### **The issues considered by the Committee**

[27] With those principles in mind, we turn now to consider the appellant's application by reference to the issues identified and decided by the Committee, against which the appellant has appealed.

*Mr Hynes did not recommend that the complainants seek legal advice*

[28] The Committee dismissed this complaint on the grounds that the agreement for sale and purchase contained a statement concerning legal advice and that the complainants in fact obtained legal advice.<sup>15</sup> The Tribunal must determine whether this was a sufficient basis on which to find that Mr Hynes did not fail to recommend that the complainants obtain legal advice. The Tribunal will make this determination on the evidence and documents that were before the Tribunal, and would not be assisted by receiving further evidence.

---

<sup>13</sup> *Eichelbaum v The Real Estate Agents Authority* [2016] NZREADT 3.

<sup>14</sup> *Nottingham v The Real Estate Agents Authority* [2017] NZCA 1.

<sup>15</sup> Substantive decision, at paragraph 3.27.

*Mr Hynes did not recommend that the complainants seek technical or other advice;*

[29] The Committee dismissed this complaint on the grounds that the agreement for sale and purchase contained a five-day day due diligence period, during which the complainants could have withdrawn from the purchase.<sup>16</sup> The Committee also referred to the complainants' statement (in their complaint) that they had carried out investigations, including the roof cavity and underfloor areas. The Tribunal must determine whether this was a sufficient basis to find that Mr Hynes did not fail to recommend that the complainants seek technical or other advice, and would not be assisted by receiving further evidence.

*Mr Hynes did not allow the complainants a reasonable opportunity to obtain technical or other advice*

[30] The Committee's finding<sup>17</sup> that Mr Hynes did not fail to give the complainants a reasonable opportunity to obtain technical or other advice followed from the decision referred to in paragraph [29], above. In deciding whether the Committee erred in making that finding, the Tribunal would not be assisted by receiving further evidence.

*Mr Hynes did not disclose risk or existence of hidden defects*

[31] The Committee referred to the wording of r 10.7, as to disclosure of defects. It found that in the present case, all of the evidence supported a conclusion that rot in the floorboards, extending to the joists, was a "classic example" of a "hidden defect", and one which a reasonably competent licensee could not have been expected to suspect existed.<sup>18</sup> The Committee noted that the complainants did not themselves discover the rot when they inspected the property before making their offer. The Committee found that the rot problem was not discoverable by anyone on a simple observation.

[32] Ms Brook says in her notice of appeal that she and her husband know that Mr Hynes was not "legally obliged" to "go under the house to look for rot". However,

---

<sup>16</sup> Substantive decision, at paragraph 3.28.

<sup>17</sup> At paragraph 3.29.

<sup>18</sup> At paragraph 3.36.

she also says that Mr Hynes' due diligence regarding the property was inadequate, in that he ignored "red flags" and failed to note any issues with the property (in particular the potential for dampness issues) which may have needed investigating and disclosing. Ms Brook referred to a Dunedin City Council inspector's advice as to diverting stormwater seeping under the house, the presence of black polythene under the floor, and the vendor's installation of additional heating, insulation, and double glazing as pointing to potential dampness issues which Mr Hynes should have considered as part of his due diligence.

[33] With respect to this aspect of the substantive decision, Ms Brook seeks leave for an affidavit from an engineer who assessed the property to be admitted, in order to refute assumptions made by the Committee that the house would not have dampness issues, that the insulation installers may not have been aware of the rot, or that the rot did not start until the after the insulation was installed. She also seeks leave for an affidavit to be admitted from the builder who installed double glazing, before the insulation was installed. She believes that the builder will provide the Tribunal with confirmation that he advised the vendor that she had dampness issues.

[34] As noted earlier, Ms Brook's application is considered on the premise that the evidence and material she seeks to have admitted was not before the Committee (that is, that the Committee did not have statements from the engineer or builder). It is not clear from Ms Brook's notice of appeal or her application whether statements from the engineer and/or builder existed at the time of the Committee's investigation. Nor is it clear whether the complainants could reasonably have obtained statements from the engineer and builder. Ms Bishop submitted for the Authority that both could have been obtained and presented to the Committee.

[35] If, indeed, affidavits or statements could reasonably have been obtained and presented to the Committee, then the Tribunal must consider whether it is in the interests of justice that they be put before the Tribunal.

[36] The Tribunal has concluded that it would be in the interests of justice for it to receive statements from the engineer and builder. Such statements would assist it to determine whether the Committee erred in finding that there was nothing from which

it would have appeared likely to a reasonably competent licensee that the property may be subject to a significant potential risk of dampness (one outcome of which could be underfloor rot), which would have required Mr Hynes to have obtained confirmation from the vendor, supported by evidence, that the property was not subject to such a risk, or to ensure that the complainants were advised of that risk. The parties are directed to the terms of the formal Ruling, set out in the final section of this Ruling.

*Mr Hynes did not keep records for one of the open homes*

[37] It was not disputed before the Committee that Ms Hynes did not have records for an open home on 15 September 2013. The issue to be determined on appeal is whether the Committee erred in finding that even if Mr Hynes failed to keep the records, that did not constitute a breach of any of the Rules.<sup>19</sup> Determination of that issue does not require the Tribunal to receive further evidence.

*Mr Hynes failed to supply an “approved guide” as to the sale of residential property (“the guide”)<sup>20</sup>.*

[38] The Committee recorded Mr Hynes’ statement that he provided the guide to the complainants before they signed the agreement for sale and purchase, and the complainants’ acknowledgement that they received the guide, but from another person. The Committee found that the complainants did receive the guide. The issue for determination on the appeal is whether the Committee erred in making that finding, leading it to dismiss the complaint. That determination will be made after referring to the evidence before the Committee, and does not require further evidence.

*This was not a genuine multi-offer process*

[39] The complainants said to the Committee that they were pressured to make an offer by being told that there were other offers, when in fact there were no other offers. They complained of conspiracy and collusion between Mr Hynes and the

---

<sup>19</sup> At paragraph 3.37.

<sup>20</sup> At paragraph 3.39. The Committee did not refer to s 133 of the Act, but its finding appears to be, in essence, that Mr Hynes complied with that section.

vendor's attorney by putting up "false" potential purchasers. The Committee set out the complainants' evidence and submissions on this aspect of their complaint, and concluded that the complainants' evidence did not support their allegations.<sup>21</sup> The Tribunal will be required to decide whether the Committee erred in reaching that conclusion. The Tribunal would not be assisted in that determination by receiving further evidence.

*Mr Hynes did not provide the agency's in-house complaints procedure, and did not inform them that they could contact the Authority*

[40] The Committee found that the complainants had received the sale and purchase guides, which referred to the possibility of complaints to the Authority. The Committee also found that the agency had an in-house complaints procedure.<sup>22</sup> The issue for determination on the appeal will be whether that was a sufficient basis on which to find that Mr Hynes provided them with the agency's in-house complaints procedure, and informed them that they could approach the Authority. No further evidence is required in order for the Tribunal to make this determination.

### **Application to question witnesses**

[41] Ms Brook has not specified which witnesses she wishes to question, but she refers to three witnesses who gave evidence as to an odour noticed at the open homes, and to the investigation carried out by the Authority's investigator. She also refers to affidavits she and her husband put before the Committee.

[42] The Committee's decision was made on the material put before it. As in any determination of a Complaints Assessment Committee, the Committee had to assess competing statements without the benefit of the makers of those statements being present to be questioned. The Tribunal may, however, give leave for witnesses to be questioned at the hearing of an appeal. Again, such leave will only be given if permitting questioning will assist the Tribunal to determine the issues on appeal, and it is in the interests of justice to give leave.<sup>23</sup>

---

<sup>21</sup> At paragraphs 3.40–3.48.

<sup>22</sup> At paragraph 3.49.

<sup>23</sup> See *Eichelbaum v Real Estate Agents Authority (CAC 303)*, above n 13, and *Nottingham v The Real Estate Agents Authority*, above n 14.

[43] Ms Bishop submitted that the fact that an odour was detected at the open homes has no relevance to the issue of rot. However Ms Brook submits that her appeal is concerned with investigation of dampness issues rather than rot in particular (although she submits that musty odours can be associated with a history of dampness issues and potentially rot). Ms Bishop submits that the Committee had statements before it from the complainants, and visitors to the open homes, as to noticing a “musty” odour. The Committee also had a statement from the vendor’s attorney that she was aware of an “odour”, which she attributed to her mother’s cat. As well, the Committee had Mr Hynes’ statement that he was not alerted to, and did not detect, any issue of damp or rot.

[44] The Tribunal will have before it all of the statements referred to above. The inconsistency between Mr Hynes’ statement and the other statements referred to above is evident. The Tribunal will be able to determine whether the Committee erred in failing to consider whether the odour was a “red flag” that (she submits) should have led Mr Hynes to due diligence as to the possible causes of the odour (in particular whether it was caused by dampness). Accordingly, the Tribunal does not consider that it would be assisted by requiring witnesses to attend the appeal hearing in order to answer questions concerning the odour.

[45] The Tribunal does not consider that it would be assisted by giving leave for any other evidence or material to be adduced at the hearing.

### **Application to admit further evidence or material**

[46] This application referred to affidavits from an engineer who assessed the property, and an affidavit from the builder who installed double glazing, before insulation was installed. This aspect of the application has been discussed in paragraphs [33] to [36], above.

## **Ruling**

[47] Ms Brook is given leave to adduce evidence in the form of statements from the engineer who assessed the property, and the builder who installed double glazing prior to insulation being installed.

[48] In light of the fact that this appeal is set down for hearing on 25 September 2017, Ms Brook is directed to file statements of evidence from both the engineer and the builder within ten working days of the date of this Ruling. Copies of the statements of evidence are to be provided to counsel for the Authority and Mr Hynes.

[49] Ms Brook is also directed to arrange for the engineer and builder to be available at the hearing to answer any questions from the Tribunal and counsel for the other parties. Witness summonses may be issued, if sought by Ms Brook.

[50] In all other respects, Ms Brook's application is declined.

[51] Ms Brook and the parties should note that this appeal has been set down for one day. Accordingly, any questioning of the engineer and builder must be concise, and confined to the particular issue on which leave has been given.

[52] The parties have leave to request a telephone conference, should the need arise.

[53] Pursuant to s 113 of the Real Estate Agents Act 2008, the Tribunal draws the parties' attention to s 116 of the Act, which sets out appeal rights. Any appeal must be filed in the High Court within 20 working days of the date on which the Tribunal's decision is served. The procedure to be followed is set out in part 20 of the High Court Rules.

---

Hon P J Andrews  
Chairperson

---

Ms N Dangen  
Member

---

Ms C Sandelin  
Member